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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 630

CONTINENTAL CASUALTY COMPANY, INC., et al.,
Petitioners,

vs.

ALLSOP LUMBER COMPANY, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners[1] pray that a writ of certiorari be issued out of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1964, affirming a judgment entered in favor of respond-

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1. Continental Casualty Company and "D & L Construction Co. & Associates", a joint venture consisting of D & L Construction Co., a corporation, Louis Lesser Enterprises, Ltd., and Lesser Industrial Properties, Ltd., limited partnerships, D & L Construction Co., a corporation, and Louis Lesser Enterprises, Ltd., a limited partnership.

ents[2] in the United States District Court for the Western District of Missouri.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals printed as in the Appendix hereto is not as yet officially reported. The opinion of the district court, not officially reported, is set forth in the Joint Record below beginning at page 51.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1964 (R. 29). A Petition for Rehearing was denied on September 22, 1964 (R. 38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Section 1352 of the Judicial Code (28 U.S.C. 1352) enlarge the original jurisdiction of the federal district courts to include all actions between private parties whenever the ultimate security for any resulting judgment is a bond, administratively permissible but not required, when neither the form of bond nor the right being asserted is prescribed or controlled by any federal statute and adjudication does not involve any federal question?

2. Whether, in view of the limited grant of Section 2 of Article III of the Constitution of the United States, the

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2. Allsop Lumber Company, Inc., a corporation, and The United States of America, Ft. Leonard Wood C-9 Housing, Inc., and Ft. Leonard Wood C-10 Housing, Inc., for the Use and Benefit of Allsop Lumber Company, Inc.

legislature was empowered, had they so intended, to extend such jurisdiction to such actions when not involving parties of diverse citizenship or of the designated special classes or not presenting, substantially, a federal question?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1352 of Title 28 (28 U.S.C. 1352) provides in its applicable form that:

> "The district courts shall have original jurisdiction concurrent with State courts, of any action on a bond executed under any law of the United States."

Section 2 of Article III of the Constitution of the United States of America provides:

> "The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority—to all cases affecting Ambassadors, other public Ministers and Consuls—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party—to Controversies between two or more States—between a State and Citizen of another State—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, citizens or Subjects."

STATEMENT OF THE CASE

This was an action brought by a lumber dealer to recover the balance due for lumber furnished the petitioning joint venture for use in the construction of certain residential housing constructed by the latter at Ft. Leonard

Wood, Missouri, under the procedures of the Capehart Housing Act (Act of August 11, 1955, Public Law 84-345, 69 Stat. 646 ff., as amended by Act of August 7, 1956, Public Law 84-1020, 70 Stat. 1110, 12 U.S.C. 1748 ff. and 42 U.S.C. 1592 ff.).

Petitioners' liability was founded upon their execution as principals and surety of certain private bonds (R. 7, 10), the particular form of which was optional and not prescribed by statute or administrative regulation. The chosen form, among others, was apparently acceptable to the administrative officials involved; and the surety was satisfactory to the Department of Defense, the latter being the only requirement of the above Act (Section 404 of the Housing Amendments of 1955, *supra*, 42 U.S.C. 1594(a)).

Jurisdiction was alleged in the district court to have existed by virtue either of the grant of the "Miller Act" (Act of August 24, 1935, 642, 74th Cong., 1st Sess., 49 Stat. 793, as amended, 40 U.S.C. 270a-270e) or Section 1352 of the Judicial Code (28 U.S.C. 1352). The district court found (R. 51) that while it lacked any jurisdiction under the former it possessed jurisdiction under the latter section. The Court of Appeals for the Eighth Circuit sustained noting that, "This defense argument (Petitioners' argument against the applicability of the statute) may have some appeal but at this date it does not persuade us" (*Opinion*, R. 5).

Since these proceedings may draw into question the constitutionality of Section 1352 of Title 28, an Act of Congress affecting the public interest and neither the United States nor any agency, officer or employee thereof is more than a nominal party, it is noted that Section 2403 of that Title may be applicable. No court of the United States, as defined by Section 451 has, pursuant to 28 U.S.C.,

Sec. 2403, certified to the Attorney General the fact that such constitutionality of such Act of Congress has been drawn into question.

REASONS FOR GRANTING THE WRIT

In recent months the federal district courts have for the first time begun to extend their traditional jurisdiction to novel subject matters. The new area to which this effort will ultimately extend cannot be presently foreseen. Unless the outer limit soon be drawn by this Court, the extent to which this newly-acquired jurisdiction will be extended cannot be predicted.

Such extension is being accomplished by a newly found device, a little-used prerogative, Section 1352 of the Judicial Code (28 U.S.C. 1352). Historically federal jurisdiction has existed over actions on bonds only when the enforceability of the right being asserted was directly dependent upon a federally vested cause of action (thereby "substantially" presenting a federal question and avoiding any question of constitutionality under Article III).[1] This short sentence
162 (to recover U.S. Treasury bond).
inserted in the Revision of 1946 is now being used by the various district courts to extend their judicial powers

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1. Contrast: *Feibelmen* v. *Packard*, 109 U.S. 421, *Reagan* v. *Aiken*, 138 U.S. 109, *Allen* v. *Clark*, (Cal. 1938) 22 F. Supp. 898 (actions on bonds of United States Marshals); *American Surety Co.* v. *Schultz*, 237 U.S. 159, *Leslie* v. *Brown*, (C.C.A. 6, 1898) 90 Fed. 171, *Files* v. *Davis*, (C.C. Ark., 1902) 118 Fed. 465, *Crane* v. *Buckley*, (C.C. Cal., 1900) 105 Fed. 401, aff'd 203 U.S. 441 (federal supersedeas bonds); *Howard* v. *United States*, 184 U.S. 676, *Orner* v. *Saunders*, (C.C. Mo., 1875) Fed. Cases No. 10584 (bonds of federal officials); with *Lovell* v. *Newman*, 227 U.S. 412 (federal bankruptcy trustee); *Rader* v. *Manufacturers Cas. Ins. Co.*, (2 Cir.) 242 F.2d 419 (indemnity agreement given with federal bail bond); *Mudd* v. *Teague*, (8 Cir., 1955) 220 F.2d

and duties into areas of private law heretofore the domain of the state courts.

Such prolification has occurred not only in cases similar to the instant (*Autrey* v. *Williams and Dunlap*, (W.D. La., 1962) 185 F. Supp. 802; *Northwest Lumber Sales* v. *S. S. Silberblatt, Inc.*, (E.D. Mo., 1962) 211 F. Supp. 749; *National State Bank of Newark* v. *Terminal Const. Corp.*, (D.C. N.J., 1963) 217 F. Supp. 34[1]; *United States for Use of R. W. Fine* v. *Travelers Indemnity Co.*, (W.D. Mo., 1963) 215 F. Supp. 455,[2] affirmed sub nom. *Koppers Co., Inc.*, v. *Continental Cas. Co.*, (8 Cir., 1964 ..... F.2d .....; *Missouri-Illinois* v. *D & L Const. Co.*, (8 Cir., 1964) ..... F.2d .....), but in cases involving such peculiarly non-federal questions as an action for the conversion of livestock, *Adams* v. *Greeson*, (10 Cir., 1962) 300 F.2d 555, and an allegedly tortious failure to furnish any bond, *United States ex rel. Victory Electric Corp.* v. *Maryland Cas. Co.*, (E.D. N.Y., 1963) 213 F. Supp. 800, and 215 F. Supp. 700.

Section 1352 has even been used by the highest court of at least one state as a federally bestowed grant of jurisdiction upon *state* courts! *Allsop Lumber Co.* v. *Continental Casualty Co.*, (1963) 73 N.M. 64, 385 P.2d 625.

To date these extensions have received the approval of two of our Courts of appeal; *United States for the Use and Benefit of Miles Lumber Co.* v. *Harrison & Grimshaw Construction Co.*, (10 Cir., 1962) 305 F.2d 363, cert. denied 371 U.S. 920; *Lasley* v. *United States for Use of Westerman*, (5 Cir., 1960) 285 F.2d 98, in addition to the court below; *Continental Casualty Co.* v. *United States ex rel. Robertson Lumber Co.*, (8 Cir., 1962) 305 F.2d 794, cert.

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2. There is but one reported case to the contrary, *United States ex rel. General Acc. Fire & Life Assur. Corp.* v. *Maguire Homes, Inc.*, (1959) 186 F. Supp. 659.

denied 371 U.S. 922. In neither of these cases was the question fully briefed or discussed. To the rather full briefing of the intent and history of this addition to the code and constitutional question which its unrestricted use may raise, the court below noted only, "This defense argument may have some appeal but *at this date* it does not persuade us." *Continental Casualty Co.* v. *Allsop Lumber Co., Inc.*, (8 Cir., 1964) ..... F.2d ..... (Appendix p. A5).

We submit that, contrariwise, this is indeed the date when, if persuaded, that persuasion should be announced, else for lack of direction such novel and unique extensions of federal jurisdiction continue unabated and unreviewed. Unless this Court through the exercise of its supervisory power can stop to examine the justification for this novel departure from the accepted and tested bases of federal court jurisdiction with the resultant possible inundation of federal dockets no lesser tribunal apparently will.

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RODGER J. WALSH,
Attorney for Petitioners.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that in accordance with the provisions of Rule 33 of this Court he did on the 26th day of October, 1964, cause to be placed in an authorized depository of the United States Post Office, with first class air mail postage prepaid copies of the foregoing in envelopes duly addressed to: Mr. Frank Gaffney, 2900 Grant Building Pittsburgh, Pennsylvania, and the Solicitor General, Department of Justice, Washington 25, D. C.

.....,

RODGER J. WALSH.